No. 72-1708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

VIVIAN KELLEMEN, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF TO RESPONDENT'S MEMORANDUM IN OPPOSITION

DAVID R. SEIDLITZ
Munsey Building
Washington, D.C. 20004
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX OF CITATIONS

Page

CASES:

Faraco v. *Commissioner*, 261 F.2d 387 (CA 4, 1958), cert. den. 359 U.S. 925 (1959) 3, 4

Hoeper v. *Tax Commission*, 284 U.S. 206 (1931) 5

Moritz v. *Commissioner*, 469 F.2d 466 (1972), cert. den. May 21, 1973 2

Poe v. *Seaborn*, 282 U.S. 101 (1930) 4

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 2

Savings & Loan Association v. *Topeka*, 87 U.S. 655 (1875) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1708

VIVIEN KELLEMS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF TO RESPONDENT'S MEMORANDUM IN OPPOSITION

The Government's Memorandum in Opposition to certiorari seeks to gloss the constitutional issue and divert attention from its importance.

This case involves the constitutionality of a 41.7% penalty tax in the amount of $3,158.08 imposed for 1965 against the 77 year old petitioner *solely because*

she was not married. This constitutional issue arises under provisions of the Internal Revenue Code providing annual bonuses ranging up to $17.1 billion dollars to $21.5 billion dollars[1] for those most able to pay with the burden of those bonuses *added to the liabilities of all low income taxpayers, all single taxpayers, and the National Debt.*

In light of the Supreme Court's position in *Savings & Loan Association* v. *Topeka*,[2] it is clear this case presents penalties of enormous proportions against the single taxpayer in disregard of due process and equal protection principles. Yet, the Government seeks to obscure the issue by conceding that "the income-splitting device may foster disparities" comparable to school taxes dealt with in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). The enormity of the invidious discrimination against the single and low income taxpayer and the raid against the Treasury, totalling more than $300 billion dollars, carried out under the income splitting device should not be minimized as comparable to property tax rates for school districts.

Doesn't it seem strange that a few weeks ago the Government requested certiorari in the *Moritz* case[3] but now opposes certiorari in the instant case? The *Moritz* case involved a $600 *deduction* denied to a single man in a highly isolated situation that could not be expected to affect wealthy taxpayers or have an impact of more than a few thousand dollars on the

---

[1] Petition for Certiorari, pp. 4, 18

[2] 87 U.S. 655 (1875).

[3] 469 F.2d 466 (1972), cert. den. May 21, 1973.

Treasury. In the instant Kellems case the penalties imposed against her for being single have already amounted to more than $90,000, inclusive of interest. The cost of the splitting device to the Treasury has been up to $21.5 billion dollars annually. It has added more than $300 billion dollars to the National Debt. Its impact on tens of millions of low income and single taxpayers has been both unconscionable and devastating. It has resulted in greater disparity between the rich and the poor than existed 40 years ago. Under these circumstances it would seem that both consistency and concern for the welfare of the United States would have prompted the Solicitor General to join in requesting certiorari.[4]

Unlike the Courts below, which did not see fit to mention the *Faraco* case,[5] the Memorandum in Opposition boldly relies upon that case. There can be no better reason for granting certiorari than the utter disregard of constitutional rights encompassed by that decision. The Court of Appeals regarded as "slight" a 40.37% annual penalty against Mrs. Faraco because her husband died and concluded as follows:

> "* * * The fact that the change gave a proportionately greater tax reduction to married couples with large incomes is wholly irrelevant; if the rapid acceleration of the progressive tax rates ran afoul of no constitutional guaranty, a slight withdrawal may not be said to have done so."

The above principle stated in *Faraco*, though patently unsound, is the theory on which the Courts

[4] See Statement of Randolph Paul, Petition for Certiorari, p. 16.

[5] *Faraco* v. *Commissioner*, 261 F.2d 628, 2 AFTR 2d 6122 (CA 4, 1958), cert. den. 359 U.S. 925 (1959).

have proceeded below. The position taken in the instant Kellems case can be sustained only if it is constitutionally permissible, as held in *Faraco*, for tax rates *equally* applied to all to be withdrawn *unequally* in favor of those most able to pay. A principle so unfair, so clearly unsound, and in such direct violation of constitutionally protected rights clearly requires consideration by this Court.

In its brief to the Second Circuit, the Government asserted and the Court agreed that the Sixteenth Amendment authorizes "governmental regulation in the social and economic field" and *empowers Congress "to regulate, restrict or penalize single persons through higher tax rates on their income"* if it chooses to do so (Brief pp. 11 and 22). In less harsh terms, the Solicitor General's Memorandum in Opposition takes the same position. We submit that *the Government's position is monstrously wrong.* Does the plain language of the Sixteenth Amendment empower Congress to "regulate, restrict or penalize single persons through higher tax rates" for being unmarried? Such claimed scope and purpose for the Sixteenth Amendment empowering Congress "to lay and collect taxes on incomes" is so shockingly improper as to obviously require the attention of this Court.

The Memorandum in Opposition continues to utilize *Poe* v. *Seaborn*, 282 U.S. 101 (1930), dealing with vested property rights to obscure the true nature of the constitutional issue in this case. What right did the Congress have to heavily penalize single taxpayers while allegedly correcting a comparatively slight disparity between married taxpayers in common law and community property states? *Are not single taxpayers covered by the same Constitution that protects married*

taxpayers? What provision of the Constitution empowers Congress to impose penalties in excess of 40% on unmarried taxpayers while granting tax reduction of up to more than 40% to wealthy married taxpayers? As pointed out in our petition for certiorari there is no conceivable reason for not granting the splitting device to the single taxpayer just as it was granted to the married taxpayer and to the widowed single taxpayer.

The Memorandum in Opposition ignores the fact that in *Hoeper* v. *Tax Commission*, 284 U.S. 206 (1931), the Supreme Court squarely held that being married or single does not "so alter the taxable status of one receiving income as to justify a different measure for the tax." That holding is in direct conflict with the decision below. The suggestion that the case may be distinguished on the ground that in *Hoeper* the husband had no control over the income is misplaced. Mr. Justice Holmes' dissenting opinion expressly pointed out that the husband had "actual enjoyment of the property taxed" and "would get the benefit of the income of each without inquiry into the source." The only substantive difference between *Hoeper* and the instant case is that the tax of a *married* man was increased in *Hoeper* and the tax of a *single woman* increased in this case. That, we submit, is not grounds for a constitutional distinction.

It is further suggested that Congress could have based the splitting device on "ability to pay". The absurdity of this assertion is equaled only by its lack of candor. The splitting device was designed solely for the benefit of the wealthy, with maximum benefit going to the childless married taxpayer having the greatest ability to pay. See statements of President

Truman, Senator Douglas, Assistant Secretary of the Treasury Cohen, Randolph Paul, Congressman Eberharter, Congressman Sabath, Speaker of the House McCormack, and Brookings Institution Computer Analysis set forth in *The Rape of the Taxpayer*, at pages 15-18 of Petition for Certi i.

Because she is single, petition s been discriminated against with callous disregard of due process and equal protection principles. The "smarting sense of injustice" described by Senator Douglas has now reached the point of a deep sense of outraged despair by millions of single taxpayers. The constitutional issue involved is of fundamental and transcendent importance meriting the highest priority for consideration by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

DAVID R. SHELTON
Munsey Building
Washington, D.C. 20004
Counsel for Petitioner

August 1973